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Supreme Court of the United States

October Term, 1979
No. 79-1406

CITY OF LOS ANGELES, *et al.*,

Petitioners,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

BRIEF OF AMICI CURIAE THE SAN DIEGO UNIFIED PORT DISTRICT AND THE COUNTY OF ORANGE, CALIFORNIA.

MICHAEL SCOTT GATZKE,
LOUIS E. GOEBEL,
CHRISTOPHER J. WALT,
LUCE, FORWARD, HAMILTON & SCRIPPS,
1700 The Bank of California Plaza,
110 West "A" Street,
San Diego, Calif. 92101,
(714) 236-1414,
Attorneys for Amici Curiae,
San Diego Unified Port District
and County of Orange, California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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BRIEF OF AMICI CURIAE, THE SAN DIEGO UNIFIED PORT DISTRICT AND THE COUNTY OF ORANGE, CALIFORNIA.

Pursuant to Supreme Court Rule 42, the San Diego Unified Port District and the County of Orange, California, respectfully submit this brief *amici curiae* in support of the petition of the City of Los Angeles for this Court's Writ of Certiorari to the California Supreme Court. Counsel for all parties have consented to the filing of this brief, and copies of the letters of consent are being lodged with the Court with the filing of this brief.

Interest of Amici Curiae.

The City of Los Angeles has petitioned this Court for a Writ of Certiorari seeking review of the decision of the California Supreme Court in *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal.3d 86, 160 Cal.Rptr. 733 (1979). In that case, the California Supreme Court sanctioned the exercise of state court jurisdiction, and the application of state law nuisance standards (California Civil Code §3479 [West 1974]), to hold the City of Los Angeles liable (as the proprietor of Los Angeles International Airport (LAX)) to various residents of areas around LAX for "emotional and mental distress" allegedly resulting from noise generated by commercial jet aircraft operations.

The San Diego Unified Port District is a special district created by the California Legislature[1] for the purpose, among others, of acting as the proprietor of San Diego International Airport - Lindbergh Field (SAN), San Diego's only commercial air carrier airport. The Port District is currently a defendant in consolidated state court noise actions originally brought by approximately 900 residents in respect of more than 300 parcels of residential property in the area surrounding Lindbergh Field;[2] and it is also a defendant in a noise action brought by the San Diego Unified

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[1]San Diego Unified Port District Act, Stats. 1962, 1st Ex. Sess., c. 67, (California Harbors & Navigation Code, Appendix 1, §§1 *et seq.* [West 1978]).

[2]*Britt, et al. v. San Diego Unified Port Dist.*, San Diego Superior Court No. 367963 (June, 1975), consolidated with *Banks, et al. v. San Diego Unified Port Dist.*, San Diego Superior Court No. 379755 (March, 1976) and *Lewis v. San Diego Unified Port Dist.*, San Diego Superior Court No. 340165, interlocutory appeal taken *sub nom, San Diego Unified Port Dist. v. Superior Court*, 67 Cal.App.3d 361 (1977), *cert. denied sub nom, Britt v. San Diego Unified Port Dist.*, 434 U.S. 859 (1978).

School District.[3] In these actions, recovery is sought in total amounts exceeding $100,000,000, based, in part, on state law nuisance theories of recovery, and on liability allegations substantially similar to those made against the City of Los Angeles in *Greater Westchester*.

The County of Orange is a California public entity which is the proprietor of Orange County's commercial air carrier airport, John Wayne Airport, Orange County (JWA). The County is presently a defendant in two airport noise lawsuits brought by residents in areas in the general vicinity of JWA.[4] These lawsuits also present issues substantially similar to issues dealt with in *Greater Westchester*, and the damages alleged in these cases exceed $20,000,000.

Thus, the issues decided in *Greater Westchester* are of substantial importance to the County of Orange and to the San Diego Unified Port District since the decision is, at least potentially, of direct application to significant litigation now pending against the County and the Port District.

Question Presented.

Whether federal law has preempted the California courts from exercising their jurisdiction to regulate jet aircraft operations at an airport which is part of the national air transportation system through the award of civil tort damages under the authority of California's civil nuisance statute.

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[3]*San Diego Unified School Dist. v. San Diego Unified Port Dist.*, San Diego Superior Court No. 372835 (October, 1975).

[4]*Andrews, et al. v. County of Orange*, Orange County Superior Court No. 163621, consolidated with case numbers 163693, 165077, 205722, 165433 (November, 1968, trieu May, 1978, appeal pending); and *Anderson, et al. v. County of Orange*, Orange County Superior Court No. 273916 (August, 1977).

Summary of Argument.

In its decision in *Greater Westchester*, the California Supreme Court held that an airport proprietor could be liable under a state tort law theory of nuisance for "mental and emotional distress" allegedly suffered by persons residing in the vicinity of Los Angeles International Airport, and allegedly caused by noise generated by jet aircraft operating at that facility. The Supreme Court determined that state law nuisance standards of conduct could govern the adjudication of such cases, independent of, and without consideration for, the existing pervasive scheme of federal regulation which governs the nation's air transportation system.

Obviously, the airports in this country, particularly those which serve the commercial air carriers, are indispensable elements of the national air transportation system.[5] Carried to its logical extension, *Greater Westchester* would sanction the exercise of independent state law jurisdiction over airport operations in each of the fifty states. If *Greater Westchester* is followed, each state would be free to regulate airport operations not only by the application of their individual standards of substantive law, but by the application of their individualized procedures and litigation processes as well. This exercise of local judicial regulation of airports for noise

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[5]Air carriers certificated by the Civil Aeronautics Board pursuant to the Federal Aviation Act of 1958 are regulated by the Administrator of the Federal Aviation Administration under Part 121 of the Federal Aviation Regulations (14 CFR Part 121). Airports serving CAB certificated air carriers are regulated by the Administrator under Part 139 of the Federal Aviation Regulations (14 CFR Part 139) pursuant to the Administrator's authority under 49 USC §1432. Los Angeles International Airport holds a Part 139 certificate from the Administrator, as does the San Diego Unified Port District with respect to Lindbergh Field, and the County of Orange with respect to John Wayne Airport. All such airports are central elements in the national airport system plan which the Administrator is required to prepare, and to update periodically, pursuant to the Airport and Airway Development Act of 1970, as amended, (49 USC §1712).

related purposes through the award of civil damages under state tort law would necessarily Balkanize the national air transportation system in this country, and it therefore constitutes an impermissible and unconstitutional intrusion into a regulatory field fully occupied and preempted by the federal government.

The decision of the California Supreme Court in *Greater Westchester* should be reviewed and reversed by this Court for the following reasons:

1. The Congress of the United States of America has enacted a comprehensive scheme of federal regulation governing the operation of the national air transportation system in this country. *E.g.*, Federal Aviation Act of 1958, 72 Stat. 731, as amended, (49 USC §§1301 *et seq.*) ("the 1958 Act"), and the Airport and Airway Development Act of 1970, as amended, (49 USC §§1701 *et seq.*).

2. This Court previously has characterized this federal regulatory scheme as "pervasive," and has held that through this legislation, the federal government has fully occupied the field of aviation regulation, for noise abatement and for other purposes, preempting all state or local controls. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). The primary basis for this Court's holding of preemption in *Burbank* was that the pervasive scope of the federal regulation in this field evidenced a recognition by Congress of the special need of air transportation for *uniformity* of regulation, and a Congressional intent that such uniformity could be achieved only by regulation at the federal, not local, level.

3. The federal occupation and preemption of this field has divested the state courts of their jurisdiction to

adjudicate — particularly by the application of state law standards of conduct — matters which fall within the field occupied by the federal regulatory scheme (*e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); and the state courts have been divested of their jurisdiction to adjudicate matters affecting aviation which the Congress intended to be free from state or local regulation in any form. (*See Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976)).

4. This pervasive federal regulatory scheme has been held by the United States Court of Appeals for the Seventh Circuit to preclude the use of state law theories of tort liability, such as nuisance, to "make unlawful flights which are in accordance with federal laws and regulations." *Luedtke v. County of Milwaukee*, 521 F.2d 387, 391 (7th Cir. 1975).

5. In direct contrast to the decision of the Seventh Circuit Court of Appeals in *Luedtke*, the decision of the California Supreme Court in *Greater Westchester* sanctions the exercise of state court jurisdiction to declare unlawful — by the application of state law standards of conduct independent of the federal regulatory scheme — activity expressly permitted by federal law.

6. To permit state courts to adjudicate aviation noise issues under concepts of state tort law necessarily authorizes local courts to substitute their judgment for that of the federal government, and particularly those agencies charged by the Congress with administering the national air transportation system,[6] over activities which are at least "arguably protected" by federal law.

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[6]The Federal Aviation Administration (FAA) and the Civil Aeronautics Board (CAB).

> Such litigation also would necessarily involve the adjudication of subject matter involving conduct which would be "arguably prohibited" by the relevant federal legislation. Absent special considerations not present in this case, such adjudications by state courts are an impermissible intrusion into a federally occupied field. *See, e.g., Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1979); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

This clear conflict of decision between the United States Court of Appeals for the Seventh Circuit in *Luedtke*, and the decision of the California Supreme Court in *Greater Westchester*, justifies the exercise of this Court's certiorari jurisdiction to review the *Greater Westchester* decision. The assertion in *Greater Westerchester* of the supremacy of state tort law over subject matter which touches heavily upon the operation and integrity of the national air transportation system — a decision which is fundamentally inconsistent with the desire of the Congress for federal regulatory uniformity in that field — requires that the decision of the California Supreme Court be reversed.

REASONS FOR GRANTING THE WRIT.

I

THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN DIRECT CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The decision of the California Supreme Court in *Greater Westchester* is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975), *aff'g. in part* and *rev'g. in part on other grounds*, 371 F.Supp. 1040 (E.D. Wis. 1974).

Luedtke involved an action against an airport proprietor and five airlines brought by nearby property owners. The plaintiffs claimed, *inter alia*, that the noise, vibrations, and fumes from aircraft using Milwaukee's commercial air carrier airport (General Mitchell Field) constituted an actionable nuisance. 521 F.2d at 388-89, 391. The trial court dismissed the nuisance count (371 F.Supp. at 1045), and on appeal, the Seventh Circuit affirmed. Relying upon this Court's decision in *City of Burbank v. Lockheed Air Terminal, Inc., supra*, the Court of Appeals held that since federal laws and regulations had preempted local control of aircraft flights, the airlines and the airport proprietor could not, to the extent they complied with such federal laws and regulations, be charged under state law with negligence or creating a nuisance. 521 F.2d at 391. In explaining its holding, the Seventh Circuit reasoned that state law "cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations." *Id.*

Facing virtually identical issues in *Greater Westchester*, the California Supreme Court reached the opposite result. The court declared that federal law had not preempted the

exercise of state court jurisdiction to apply state nuisance law to personal injury claims arising from noise generated by federally authorized aircraft operations at LAX. 26 Cal.3d at 91, 100, 160 Cal.Rptr. at 734, 739.

It is therefore appropriate for this Court to exercise its jurisdiction under 28 USC §1257(3), and to grant the Petition of the City of Los Angeles for a Writ of Certiorari to resolve this conflict of decision between the California Supreme Court and the United States Court of Appeals for the Seventh Circuit on a question of federal constitutional and statutory law which is of national significance.

II

THE DECISION OF THE CALIFORNIA SUPREME COURT IS WRONG, VIOLATIVE OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, AND CONTRARY TO EARLIER DECISIONS OF THIS COURT.

A. Federal Law Has Fully Occupied the Field of Airspace Management and Aviation Regulation.

1. The Historical Conflict Between Federal and Local Authority in the Regulation of Aviation Noise.

Greater Westchester is the first case in which a state court has exercised its jurisdiction and, applying state law nuisance standards, awarded damages for alleged "mental and emotional distress" to persons residing in the vicinity of a major commercial airport for harm alleged to have resulted from aircraft noise.

Nevertheless, while this particular form of regulation over aviation noise now adopted by the State of California is in that sense unique, the fundamental controversy between local and federal authority in this field is not new. Particularly since the introduction of modern commercial jet aircraft in the late 1950's and early 1960's, there has been a

continuing tension between efforts to impose local regulations restricting aircraft operations for noise abatement purposes, and the particular need of the national air transportation system to be free of such parochial restraints, and to be subject instead to a uniform scheme of federal regulation.

These efforts at local regulation of certain aspects of the national air transportation system have taken various forms. But with virtual unanimity, the lower courts have consistently looked past the particular form of the local regulation and focused instead on its purpose and effect.[7] In each case, if the court has found that the effect of the local regulation was to impinge upon the free use of the federal airways,[8] or to intrude, directly or indirectly, upon the federal function of airspace management, the local regulation has been held unconstitutional. The courts have consistently recognized that Congress has commanded, under the Federal Aviation Act of 1958, as amended, related legislation, and the implementing regulations of the enforcing agencies, that reg-

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[7]Such an analysis is consistent with that suggested by this Court in a preemption context in *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971) where the Court observed, "Pre-emption . . . is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." (403 U.S. at 292).

[8]"Navigable airspace" is defined in the Federal Aviation Act of 1958 as all airspace above the minimum altitudes of flight prescribed by the FAA in its regulations, and "includes airspace needed to insure safety take-off and landing of aircraft" (49 USC §1301(29)). "Federal airways" are any portion of the navigable airspace of the United States designated as such by the Secretary of Transportation (49 USC §1301(21)). The "federal airways" and other special airspace designations have been established by the FAA in Parts 71, 73 and 75 of the Federal Aviation Regulations (14 CFR Parts 71, 73 and 75).

In the Federal Aviation Act of 1958, the Congress declared that the United States was to "possess and exercise complete and exclusive national sovereignty in the airspace of the United States" (49 USC §1508), and Congress further declared that there existed "in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States" (49 USC §1304).

ulatory authority over the national air transportation system, for noise abatement or for other purposes, must ultimately originate from federal, and not local sources. *See, e.g., Luedtke v. County of Milwaukee, supra*, 521 F.2d at 391 (award of nuisance damages under state law against airport proprietor preempted); *San Diego Unified Port District v. Gianturco*, 457 F.Supp. 283 (S.D. Cal. 1978 [appeal pending]) (attempt by non-proprietor state agency to require airport proprietor to impose nighttime curfew preempted); *American Airlines, Inc. v. City of Audubon Park*, 297 F.Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir.), *cert. denied*, 396 U.S. 845 (1969) (local noise-motivated ordinance regulating altitudes of flight preempted); *American Airlines, Inc. v. Town of Hempstead*, 272 F.Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969) (local noise ordinance affecting aircraft operations preempted); *Village of Bensenville v. City of Chicago*, 16 Ill.App.3d 733, 306 N.E.2d 562 (1973) (attempt to achieve judical regulation of airport expansion and operations at O'Hare International Airport (Chicago) by means of injunctive relief preempted).

2. City of Burbank v. Lockheed Air Terminal, Inc.

This Court first faced the issue of the regulatory relationships between federal and local authorities in the field of aviation noise in *City of Burbank v. Lockheed Air Terminal, Inc., supra*. In that case, the City of Burbank adopted an ordinance which prohibited the airport proprietor, Lockheed, from permitting jet aircraft operations at Hollywood-Burbank Airport between the hours of 11:00 p.m. and 7:00 a.m. The District Court enjoined enforcement of the ordinance on Commerce Clause grounds (U.S. Const. art. I, §8, cl.3), as well as Supremacy Clause (U.S. Const. art. VI, cl.2) grounds of conflict and preemption of the field

(*Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F.Supp. 914 (C.D. Cal. 1970)). The United States Court of Appeals for the Ninth Circuit affirmed on the Supremacy Clause (457 F.2d 667 (9th Cir. 1972)).

Finding it unnecessary to reach either the Commerce Clause or conflict issues, this Court affirmed, finding that Congress had fully occupied and preempted the field. In describing the scope of the federal occupation of the field of aviation noise, the Court held:

> [T]he pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave *no room* for local curfews *or other local controls*.

411 U.S. at 638 (emphasis added).

As this Court has indicated on many occasions:

> [W]hen Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the Statute's language or *implicity contained in its structure and purpose. City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp., supra*, at 230.

Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (emphasis added). *See also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978).

In reaching its conclusion in *Burbank* regarding preemption, the Court reviewed the regulatory structure of the 1958 Act, and the regulatory purpose of the Congress, by a review of the Act's legislative history. The Court noted (411 U.S. at 627, n.3) that the Administrator of the FAA had always had broad authority to:

> develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace.

49 USC §1348(a).

In 1968, Congress expressly extended the scope of the Administrator's authority with respect to the regulation of navigable airspace to include the authority to regulate aviation noise related matters. Section 611 of the Federal Aviation Act of 1958 (49 USC §1431), added by the Act of July 21, 1968, Pub.L. 90-411, 82 Stat. 395 (''the 1968 amendment''). In the 1968 amendment, Congress directed that the Administrator,

> [i]n order to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom, . . . *shall prescribe* and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom.

49 USC §1431(b)(1) (emphasis added).

In 1972, Section 611 of the 1958 Act was further amended by the Noise Control Act of 1972 (Pub.L. 92-574, 86 Stat. 1234). That amendment, among other things, permitted the Administrator to apply any such standards or regulations to the ''issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter'' (49 USC §1431 (b)(1), as amended). This authority extends to the certification of air carrier airports (49 USC §1432, and 14 CFR Part 139). The 1972 amendments also provided for significant involvement in the field of aviation noise by the Environmental Protection Agency (EPA), and required consultation between FAA and EPA with respect to aviation

noise related matters. (*See Burbank, supra,* 411 U.S. at 629-32.)[9] In addition, Congress expressly provided that this EPA/FAA regulation of aircraft noise at the federal level was to include "control and abatement through the exercise of *any* of the FAA's regulatory authority over air commerce or transportation or over aircraft *or airport operations*" (49 USC §1431(c)(1) (emphasis added)).

However, while mandating that the Administrator actively regulate in the field of civil aviation for noise abatement purposes, Congress was careful to ensure that such regulatory activity would not act in derogation of the Administrator's other primary functions, aviation safety and the efficient utilization of airspace (49 USC §1348(a), (c)). In prescribing and amending any aviation noise related standards or regulations, the Administrator was required

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[9]With respect to the intent of the Congress to fully occupy the field of aviation noise, the Court in *Burbank* found of particular significance a letter written by then Secretary of Transportation Boyd to the Senate in connection with its hearings on the 1968 amendments adding Section 611 to the Act. This letter became part of the Senate Report (411 U.S. at 635, and n.13) and, as quoted by this Court in *Burbank*, it stated:

> The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. . . . H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

411 U.S. at 635.

The Congress continued this view of preemption when it adopted the 1972 amendments to Section 611. The House Report regarding that legislation states:

> No provision of the bill is intended to alter in any way the relationship between the authority of the Federal Government and that of State and local governments that existed with respect to matters covered by section 611 of the Federal Aviation Act of 1958 prior to the enactment of the bill.

H.R. Rep. No. 842; 92d Cong., 2d Sess. 10-11 (1972).

An identical statement is contained in the Senate Report. S. Rep. No. 1160, 92d Cong., 2d Sess. 10-11 (1972).

specifically to consider the other elements of his responsibility.

> "In prescribing and amending standards and regulations under this section, the FAA shall —
>
> (1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;
>
> (2) consult with such Federal, State, and interstate agencies as he deems appropriate;
>
> (3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;
>
> (4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and
>
> (5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section."

49 USC §1431(d).

It was this complex series of potentially competing considerations, and the special need for agency expertise to identify the point at which the delicate balance between them must be struck, which caused the Court to conclude in *Burbank*:

> The Federal Aviation Act requires a delicate balance between safety and efficiency, 49 USC §1348(a), and the protection of persons on the ground. 49 USC §1348(c). Any regulations adopted by the Administra-

> tor to control noise pollution must be consistent with the "highest degree of safety." 49 USC §1431(d)(3). *The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.*

411 U.S. at 638-39 (emphasis added).

In defining the breadth of federal preemption in this field, the *Burbank* opinion was not insensitive to the traditional local interests in the regulation of noise sources. The Court observed, "[c]ontrol of noise is of course deep-seated in the police power of the States." (411 U.S. at 638). Nevertheless, the Court then immediately continued with the statement:

> Yet the pervasive control vested in EPA and in FAA under the 1972 [Noise Control] Act seems to us to leave no room for local curfews *or other local controls*.

Id. (emphasis added).

The central theme of *Burbank* is that the complex considerations involved in the regulation of aviation noise, and the particular need of the national air transportation system for a uniform scheme of regulation by an agency with the special expertise to make the necessary balancing decisions, mandates federal occupation of the field.[10] In recognition of the Congressional mandate that any regulation in this field must come exclusively from federal sources of au-

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[10]Long before *Burbank*, the Court had already noted the unique characteristics of civil air transportation as specially requiring uniformity of regulation, characterizing air transportation as:

> [a] way of travel which quickly escapes the bounds of local regulative competence [and] call[s] for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past.

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 107 (1948).

thority, and despite the historical powers of the states to control noise, the Court concluded its opinion in *Burbank* by saying:

> We are not at liberty to diffuse the powers given by congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.

411 U.S. at 640.

B. The State Courts May Not Exercise Their Jurisdiction to Regulate, by the Award of Civil Damages or Otherwise, Activity in a Field Preempted and Occupied by Federal Regulation.

It has long been established that where federal law has preempted a field of regulation, state law is displaced, and the state courts may not exercise their jurisdiction to apply state law principles to adjudicate and regulate conduct within the scope of the federal regulatory scheme.

For example, as long ago as 1907, this Court reviewed a private common law damage action attacking the reasonableness of rates charged by a shipper subject to regulation under the Interstate Commerce Act in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). In that case the Court held that the state law had been preempted by the Interstate Commerce Act, and that the underlying purpose of the Congress in adopting that legislation was to create *uniform* shipping rates which would be regulated by an expert agency created by the Congress, the Interstate Commerce Commission. *Id.* at 439-41. In view of that intent, the Court held that the private damage action, premised upon state law principles, could not be maintained, and that state law jurisdiction had been displaced.

This Court has most frequently discussed and defined the scope of this principle in the context of private damage actions which touch upon matters subject to regulation by the National Labor Relations Board under the National Labor Relations Act. In that context, the Court originally experimented with a number of doctrines designed to reconcile the interests of the states in asserting jurisdiction over certain types of conduct, and the conflict which the exercise of such jurisdiction would present to a federal objective of a uniform scheme of federal regulation. As this Court later observed regarding those experiments (*Motor Coach Employees v. Lockridge*, 403 U.S. 274, 291 (1971)):

> [E]ach of these methods sacrificed important federal interests in a uniform law of labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application.

As a result, in *San Diego Bldg. Trades Council v. Garmon, supra,* the Court established the general principle that state jurisdiction must yield whenever the acts or activities which the state court would purport to regulate are either arguably protected by, or arguably prohibited by, the federal legislation. 359 U.S. at[11] 244. As the Court explained:

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[11]The California Supreme Court casually dismissed the *Garmon* principles as having been limited to the "unique nature" of the National Labor Relations Act (26 Cal.3d at 99, 160 Cal.Rptr. at 739). The essence of *Garmon* — that state law causes of action cannot be maintained when they threaten to interfere with a pervasive federal regulatory scheme — has been widely applied outside the area of labor relations. *See, e.g., Texas & Pac. Ry. v. Abilene Cotton Oil Co., supra,* (private damage action challenging reasonableness of railroad rates preempted by regulatory authority of Interstate Commerce Commission); *Miss. Power & Light Co. v. United Gas Pipe Line,* 532 F.2d 412 (5th Cir. 1976) *cert. denied* 429 U.S. 1094 (1977) (state law breach of contract action properly referred to Federal Power Commission which had been given by Congress power of "pervasive regulation" of the question at issue); *Chicago & North Western R. Co. v. Union Packing Co.*, 514

> To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Id.

There are certain important corollary principles in *Garmon* and in other decisions of this Court. First, the *Garmon* doctrine applies to civil damage actions with the same force and effect as it does to the exercise of state court equity jurisdiction. Indeed, the Court itself characterized the central issue of *Garmon* as, "whether the California court had jurisdiction to award damages arising out of peaceful union activity which it could not enjoin" (359 U.S. at 239); and the Court responded:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the [National Labor Relations] Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. *Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.* Even the States' salutary effort to redress private wrongs or grant compensation for

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F.2d 30 (8th Cir. 1975) (state law counterclaim for damages against railroad based on theory of unreasonable rates disallowed because courts lack power to determine reasonableness of an established tariff); *Public Serv. Coord. Transport v. Delaware River Port Auth.*, 114 N.J. Super. 334, *aff'd. sub nom. Transport of N.J. v. Delaware River Port Auth.*, 59 N.J. 531 (1971) (common law action for reparations against bridge operator extinguished by scope of federal regulatory legislation); *Crosby & Co. v. Air France*, 76 Misc.2d 990 (1973), 352 N.Y.S.2d 75, *cert. denied* 416 U.S. 986 (1974) (common law breach of contract action against air carrier preempted by federal law and tariffs published thereunder, which constitute exclusive sources of regulations and interpretations of a contract of air carriage).

> past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. [Citation]. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern.

359 U.S. at 246-47 (emphasis added).[12]

A second corollary of the *Garmon* doctrine, repeatedly reaffirmed by this Court, is that preemption is not avoided by "the general applicability of a state cause of action" or, in other words, that it does not matter "whether the States have acted through laws of broad general application rather than laws specifically directed towards" the central aim of the related federal legislation. *Sears, Roebuck & Co. v. Carpenters, supra,* 436 U.S. at 193 n.22; *Motor Coach Employees v. Lockridge, supra,* 403 U.S. at 292; *San Diego Bldg. Trades Council v. Garmon, supra,* 359 U.S. at 244.

Further, in assessing a preemption issue, the primary "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." *San Diego Bldg. Trades Council v. Garmon, supra,* 359 U.S. at 243; *see*

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[12]The California Supreme Court acknowledged that the California courts could not *enjoin* flights "conducted in strict compliance with federal regulations," in part, because to do so would create a "likelihood of direct conflict with federal law" (26 Cal.3d at 94, 160 Cal.Rptr. at 736). Yet, the Court then found that state nuisance law may nonetheless be used to declare such flights unlawful for purposes of awarding civil damages. The quoted material from *Garmon*, however, precludes such a distinction. Either remedy is impermissible, because both necessarily involve "allowing two law making sources to govern" the same preempted activity.

also Motor Coach Employees v. Lockridge, supra, 403 U.S. at 292.

Finally, the Court has indicated that it is concerned as much with a "multiplicity of tribunals and a diversity of procedures" as with "different rules of substantive law." *San Diego Bldg. Trades Council v. Garmon, supra*, 359 U.S. at 243.

The California courts which have passed on this case have uniformly failed to make the necessary preemption analysis under the principles established by this Court in *Abilene, Garmon*, and their progeny. Indeed, only the California Supreme Court even recognized the potential applicability of the preemption doctrines flowing from the *Garmon* line of cases, and that Court simply refused, without any meaningful analysis, and virtually by a sheer force of will, to apply properly the relevant preemption principles.

As observed in *Motor Coach Employees v. Lockridge, supra,*

> As it appears to us, nothing could serve more fully to defeat the congressional goals underlying the [National Labor Relations] Act than to subject, without limitation, the relationships it seeks to create to the concurrent jurisdiction of state and federal courts free to apply the general local law.

403 U.S. at 286.

It is inescapable that the principle just quoted, particularly in light of this Court's opinion in *Burbank*, is *at least* as applicable to the field of aviation noise regulation as it is to the field covered by the National Labor Relations Act. As this Court found in *Burbank*, the clear Congressional purpose in enacting the Federal Aviation Act of 1958, as amended by relevant noise related provisions, is a *uniform-*

ity of regulation to be administered by expert agencies under the aegis of federal law, not state law.

Nevertheless, the California courts have now asserted their jurisdiction to regulate aviation noise related matters despite the clear holding in *Burbank* that the "States and municipalities" might be let in on the planning in the field of aviation noise only by subsequent Congressional action, action which has not since been taken.[13] Contrary to both *Burbank* and *Garmon*, the California courts thus assert that "two law-making sources" may indeed govern in this field—the federal authorities applying principles of federal law, and the California courts applying principles of the state tort law. Indeed, the logical extension of the California Supreme Court's opinion in *Greater Westchester* is that, not only may "two law-making sources" govern in this field, but judicial authorities in each and every state may exercise their jurisdiction over the nation's airports to adjudicate airport operations in a noise related context.

We respectfully suggest that a review of the following three primary lines of preemption analysis established by this Court regarding the assertion of state court jurisdiction in civil damage actions demonstrates that the California Supreme Court is wrong; and that its failure to make any meaningful preemption analysis resulted in its erroneous conclusion and its erroneous assertion of state court jurisdiction.

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[13]In fact, Congress has acted, if at all, to strengthen the federal role. For example, Section 105(a)(1) of the Airline Deregulation Act of 1978 (Pub.L. 95-504, 92 Stat. 1708) [49 USC §1305(a)(1)] now expressly prohibits any State from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier" operating under federal authority. The award of state tort damages based upon the "services" provided the federally certificated air carriers as authorized by *Greater Westchester* appears directly to violate this Congressional prohibition.

1. Congressional Displacement of State Action — The "Machinists" Test.

The first line of preemption analysis which should have been considered by the California Supreme Court, but was not, was most recently and most completely discussed in *Machinists v. Wisconsin Employment Relations Comm'n, supra* (*see also Teamsters Union v. Morton*, 377 U.S. 252 (1964)). There, this Court noted that there may exist situations in certain federal regulatory fields where " '[t]he legislative purpose may . . . dictate that certain activity "neither protected nor prohibited" [nevertheless] be deemed privileged against state regulation.' " 427 U.S. at 141. Thus, although the conduct at issue in the preemption analysis may be conduct which is neither arguably protected nor arguably prohibited by the relevant federal legislation, there necessarily remains the critical preemption inquiry of whether "Congress occupied this field and closed it to state regulation." *Id.* at 146. In such a situation, "regulation by the State is impermissible because it 'stands as an obstacle to the accomplishment and execution of the purposes and objectives of the Congress.' " *Id.* at 150-51 (quoting *Teamsters Union v. Morton, supra*).[14]

Of all of the lines of preemption analysis which should have been made in *Greater Westchester*, this perhaps is the one most directly applicable to the case, and the one which most conclusively demonstrates the impermissibility of the California Supreme Court's authorization of state court jurisdiction to regulate airport operations in respect of noise related matters. *Greater Westchester* simply cannot stand together with *Machinists* and the unequivocal holding of

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[14]In the context of the *Garmon* doctrine, the *Machinists* test may be viewed as one branch of the "arguably protected" analysis. *See Sears, Roebuck & Co. v. Carpenters, supra*, 436 U.S. at 199-200 n. 30.

this Court in *Burbank* that the Congress directed uniformity of regulation at the federal level which has rendered the operation of the national air transportation system "privileged against state regulation;" and that the Congress fully intended by the breadth of the regulatory scheme to occupy the field and "close it to state regulation." The conclusion of the California Supreme Court that the State's jurisdiction may nevertheless be exercised with respect to matters squarely within the central aim of the federal legislation, and that state law standards of conduct may be applied with respect to the operation of a commercial air carrier airport, seems to require a "rationale" oriented to the result, rather than the requirements of the law.[15]

2. *The "Arguably Protected" Test.*

The second necessary line of preemption analysis which should have been considered in *Greater Westchester,* but was not adequately made, is the analysis applied to the purported exercise of state court jurisdiction over conduct which is "arguably protected" by the relevant federal legislation. In this analysis, "[c]onsiderations of federal supremacy . . . are implicated to a greater extent" than when an analysis is made under the "arguably prohibited" branch of the *Garmon* doctrine. *Sears, Roebuck & Co. v. Carpenters, supra,* 436 U.S. at 200. The decision of the California Supreme Court in *Greater Westchester* declares unlawful, under state tort law, activities which are clearly and directly protected by federal law.

Congress has "declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States" (49

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[15]This conclusion is supported at least to some extent by the concurring opinion in *Greater Westchester*, 26 Cal.3d at 105, 160 Cal.Rptr. at 742 (Bird, C. J.).

USC §1304). The exercise of that right is exhaustively regulated both by the Federal Aviation Administration and, in the case of commercial operators, the Civil Aeronautics Board. Referring specifically, for example, to the primary noise sources which resulted in the imposition of liability against the City of Los Angeles in this case (the operation of commercial jet air carrier aircraft) the Administrator of the Federal Aviation Administration regulates and certificates the air carriers themselves (49 USC §1424; 14 CFR Part 121), the aircraft which they fly (49 USC §1423; 14 CFR Parts 21 and 25), including their noise characteristics (49 USC §1431) both individually (14 CFR Part 36) and with respect to the "fleet mix" of each certificated air carrier (14 CFR Part 91, Subpart E, §91.301-311). The Adminsitrator also regulates and certificates the airmen who fly the planes for the air carriers (*e.g.*, 49 USC §1422), and the airports at which the air carriers operate (49 USC §1432; 14 CFR Part 139).

The court in *Greater Westchester* also placed substantial emphasis upon the fact that liability in that case arose from the construction and use of the north runway complex at LAX (26 Cal.3d at 91, 160 Cal.Rptr. at 734) which, the court noted, was undertaken with "substantial federal financial assistance under Grant Agreements between the City and the Federal Aviation Administration" (*Id.* at 92, 160 Cal.Rptr 735). The Federal Aviation Act of 1958 prohibits the expenditure of federal funds for the purpose of constructing any such runway complex "except upon written recommendation and certification by the Administrator that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense." (49 USC §1349(a)) (emphasis added). Further, the expenditure of such federal funds for the construction of a runway complex was subject to federal regulatory provisions under

the Federal Airport Act, 49 USC §§1101 *et seq.* (repealed 1970; current statute is the Airport and Airway Development Act of 1970 [49 USC §§1701 *et seq.*]). With respect to such projects, the project applications are matters of public record, and any person with a substantial interest in the application might have filed a memorandum in opposition to the application (former 49 USC §1108(e)). The Airport and Airway Development Act of 1970, 49 USC §§1701 *et seq.*, also provides, for example, that the Secretary of Transportation may approve federal funding of such projects "only if he is satisfied that—[] the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located" (49 USC §1716(c)(1)(A)), and that appropriate public hearings have been held on the "economic, social, and environmental effects of the airport location and its consistency with the goals and objectives of such urban planning as has been carried out by the community" (49 USC §1716(d)(1)).[16]

Nor is that the extent of the federal government's regulation of air carrier activity, or its analysis of the environmental consequences of air carrier operations at any particular airport. No air carrier may operate without a certificate of public convenience and necessity from the Civil Aeronautics Board (49 USC §1371(a)) which must expressly specify the airports which each air carrier is authorized to serve (49 USC §1371(e)(1)). In considering such applications, the CAB must consider the environmental impact of proposed aircraft services on persons and property lying beneath the routes as part of the Board's decision of whether

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[16]The sponsor must also submit a written statement specifying what consideration has been given to the interest of all communities in or near which the project is located, and containing the substance of any objection to the project. 14 CFR §151.26(b)(1).

to certificate service to particular points. *Palisades Citizens Association, Inc. v. C.A.B.*, 420 F.2d 188, 191 (D.C. Cir. 1969).[17] Indeed, the CAB has placed restrictions on aircraft noise levels even in cases where a major federal action significantly affecting the environment was not involved. Applications of Colonial Airlines, CAB Orders 78-6-183/184, 78-8-116; Docket Nos. 30587 and 30591 (1978).[18]

Private citizens may participate in CAB proceedings. Any person may attend a CAB hearing and present evidence relevant to the issues. 14 CFR §302.14(b). Individuals have the right to submit comments on draft environmental impact statements (14 CFR §312.14(e)), and parties to the proceeding may testify, offer evidence, and cross-examine witnesses on the final environmental impact statement or other environmental issues within the scope of the proceeding. 14 CFR §312.17(b).

Nor are property owners affected by noise without judicial remedies. They may, for example, bring suit to enjoin airport runway development in order to test the FAA's compliance with federal law. *Steele Creek Community Ass'n v. U.S. Dept. of Transp.*, 435 F.Supp. 196 (W.D.N.C. 1977), *aff'd* 570 F.2d 346 (4th Cir. 1978).

Thus, the concerns of local interests affected by airport noise can be accommodated within the federal regulatory

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[17]Even after deregulation, the CAB continues to acknowledge its "responsibility to consider environmental matters as an element of the public convenience and necessity." 44 Fed.Reg. 45,638 (Aug. 3, 1979).

[18]The CAB's regulations implementing the National Environmental Policy Act of 1969 (NEPA), 42 USC §§4321 *et seq.*, require an environmental review of all major CAB actions which potentially affect the environment. 14 CFR §312.4(b). The entire range of actions undertaken by the Board are covered by the regulations (14 CFR §312.7(i)) including actions which would "lead to a significant increase in the ambient noise level for a substantial number of people." 14 CFR §312.10(a)(2).

scheme for airspace management. Using state court nuisance suits as the vehicle for implementing local noise decisions, however, permits the state courts to use local law to penalize federally authorized activity; to substitute their judgments for those of the expert federal agencies; and thus to pose a substantial threat that "impermissible parochial considerations may inhibit the accomplishment of legitimate national goals." *British Airways Bd. v. Port Authority of New York, Etc.*, 564 F.2d 1002, 1011 (2d Cir. 1977).

3. The "Arguably Prohibited" Test.

The third major line of preemption analysis arising from *Garmon* is invoked whenever the state court would purport to exercise its jurisdiction to adjudicate conduct "arguably prohibited" by the federal regulatory scheme. Any tort adjudication under state law regarding a proprietor's conduct in exercising its proprietary authority to regulate the use of its airport would necessarily involve issues which would fall within the scope of the "arguably prohibited" analysis.[19]

The fundamental principle of *Greater Westchester* is that local courts may exercise their judgment as to whether or not an airport proprietor has exercised its proprietary authority as landlord in a "reasonable" manner, and that the state court may award damages if it finds that the proprietor has not restricted airport use in a fashion consistent with state law standards of conduct. Presumably, however, the state court would also have to determine whether or not the proposed conduct which should have been taken by the

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[19]As discussed in Section C, *infra*, airport proprietors acting as landlords *may have* some residual regulatory authority in a field which is, as declared in *Burbank*, otherwise completely preempted to state and local agencies of government. However, any such special authority is derived from a federal source, and is subject to limitations of federal law. The discussion here assumes (as the California Supreme Court assumed) that airport proprietors may, under some circumstances, regulate airport use for noise abatement purposes.

proprietor would have resulted, directly or indirectly, in the grant of an actual or constructive "exclusive right" prohibited by 49 USC §1349(a);[20] would have been "unjustly discriminatory" within the meaning of 49 USC §1718(a)(1); would interfere or conflict with the FAA's mission of air traffic safety and airspace management (FAA/DOT, *Aviation Noise Abatement Policy* ("*Noise Policy*") (1976) at 58-59); would be unreasonable, unduly burdensome to interstate commerce, or detrimental to the operation of the national air transportation system (*Id.* at 59); or (at least according to the CAB) would be in conflict with the "policies and purposes" of the Airline Deregulation Act of 1978 (44 Fed.Reg. 9,948-52 (Feb. 15, 1979) (to be codified in 14 CFR §399.10)).

With respect to each of these matters, the FAA has observed that:

> The proprietor's obligations to refrain from imposing an undue burden on interstate or foreign commerce or discriminating unjustly, and to avoid potential conflicts with the FAA's control of airspace and air traffic, are not difficult to articulate as matters of principle *but very difficult to apply to a given factual situation.*

Noise Policy at 58 (emphasis added).

It seems inevitable that any adjudication involving concepts of state tort law, "wrongfulness," "reasonableness," or other standards intended to measure the relative accept-

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[20]The FAA has taken the position that a grant to one or more parties of a right or privilege, but excluding any other party from enjoying a similar right, is a discriminatory grant of an "exclusive right." FAA Advisory Circular 150/5190-2A (April 4, 1972). *See also* 40 U.S.Op.Att'y.Gen. 71 (1941).

Any person may file a complaint with FAA or CAB regarding any violation of the 1958 Act (49 USC §1482(a)). The Administrator's regulations on investigatory procedures (14 CFR Part 13) have recently been expanded (44 Fed.Reg. 63,720). (Nov. 3, 1979).

ability of a proprietor's conduct against some local standard of care, would necessarily involve adjudication of these very concepts which, while simple sounding, are "difficult to apply to a given factual situation," even for the expert agency, the FAA. If such matters are *not* adjudicated at the local level, the state law would essentially purport to impose principles of "strict liability" on the operation of the national air transportation system. If such issues *are* adjudicated in a state law tort context, then necessarily the local courts would be substituting their judgment for that of the expert federal agency. The potential for conflicting and inconsistent decisions among the different state courts is, obviously, substantial. The potential for conflict with *federal* policy is even greater.

C. The So-Called "Proprietor Exception" to the Holding in Burbank Is Not a Sufficient Basis for the California Supreme Court to Authorize the Exercise of State Court Jurisdiction for the Purpose of Applying State Law Standards to Review and Control Proprietor Conduct.

In footnote 14 in its opinion in *Burbank*, this Court noted that it was not considering in that case the "limits, if any [which] applied to a municipality *as a proprietor*." (411 U.S. at 635 n.14) (emphasis added). The distinction in this field between the *total* preemption of state or local police power or other general delegations of governmental authority, and the *possibility* that there is some residual regulatory authority in the local entity which is the landlord of an airport, grows out of the decision of this Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). In that case, the Court held, under the particular factual circumstances there present, that it is the obligation of the airport proprietor to acquire sufficient property interests to permit

the operation of a newly constructed airport, including property interests necessary for noise generated by aircraft operations. Lower courts have thus concluded that because of this special potential inverse condemnation liability, an airport proprietor must have some concomitant authority to regulate the use of its airport in order to limit its liability (*e.g., National Aviation v. City of Hayward*, 418 F.Supp. 417, 424 (N.D. Cal. 1976); *Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667, 674 and n.8 (9th Cir. 1972)).[21]

In *Greater Westchester*, the California Supreme Court seized upon the possible existence of a "proprietor exception" and reasoned that if the proprietor is generally liable under *Griggs* and under the Federal Constitution to pay just compensation for the acquisition of property interests (U.S. Const. amends. V and XIV), the state courts may also apply their general tort law to regulate the proprietor's conduct. 26 Cal.3d at 95-99, 160 Cal.Rptr at 736-38. That holding, however, ignores the special character of the "proprietor exception" (to the extent that it exists), and results from the California Supreme Court's failure to focus upon the proper question which really was presented to it.

First, the fact that an airport proprietor may have been permitted by the Congress to retain some residual regulatory authority as landlord is not a sufficient justification for the exercise of concurrent state court jurisdiction to regulate the

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[21]The dissent in *Burbank* questioned whether the federal statutes drew a distinction between the regulatory authority of airport proprietors and nonproprietors. "If the statute actually enacted drew this distinction," Mr. Justice Rehnquist wrote, "I would of course respect it." 411 U.S. at 651. The Airline Deregulation Act of 1978, amending the Federal Aviation Act, does expressly distinguish for purposes of preemption between states or subdivisions thereof which are not proprietors, and those which are airport operators. *Compare* 49 USC §1305(a)(1) *with* 49 USC §1305(b)(1).

proprietor's conduct in the face of a pervasive federal regulatory scheme. The source of the proprietor's authority, if any, is not state law. Rather, as the Second Circuit Court of Appeals recently observed, proprietary authority itself derives from a federal source. *British Airways Bd. v. Port Authority of New York Etc.*, 564 F.2d 1002, 1010 (2nd Cir. 1977). Commenting on an earlier opinion which it had delivered in the same case (558 F.2d 75 (2nd Cir. 1977)), the court said:

> Our initial opinion in this case delineated the extremely limited role *Congress had reserved* for airport proprietors in our system of aviation management.

564 F.2d at 1010 (emphasis added).

The Court also had referred earlier to the "cooperative scheme" of aviation management which *Congress had created* between the federal agencies and, to a "limited" extent, airport proprietors, pursuant to the Federal Aviation Act of 1958. 558 F.2d at 83, 84.

However, the existence of this special authority does not imply that other state or local agencies may then evade this Court's holding in *Burbank* through the simple expedient of using their general delegations of governmental power to regulate directly, under state law, the proprietor's conduct. As noted by the United States District Court for the Northern District of California in *National Aviation v. City of Hayward, supra,* (*upholding* a *proprietor imposed* curfew in the face of a *Burbank* challenge):

> [I]t seems clear that if this ordinance was passed by a state or local government not the proprietor of the airport, it would run afoul of *Burbank* and would constitute an impermissible exercise of police power in an area preempted by Congress.

418 F.Supp. at 421.

And when a state agency which is not the proprietor of an airport attempts under state law to require an airport proprietor to impose a proprietary use restriction, such as a curfew, the effort constitutes an unconstitutional intrusion into the federally preempted field and a violation of this Court's decision in *Burbank. San Diego Unified Port Dist. v. Gianturco, supra*, 457 F.Supp. at 292 (S.D. Cal. 1978). Indeed, the Civil Aeronautics Board, in commenting on the preemption provisions of the Airline Deregulation Act of 1978 (49 USC §1305(a)(1)) has noted:

> The full scope of [proprietor] rights and powers has yet to be developed, but *it is clear that the airport proprietor must be acting on its own, not under legislative compulsion*, and that its actions must be reasonable, non-discriminatory, and non-burdensome to interstate commerce and reasonably prompt.

44 Fed.Reg. 9,948, 9,951 (Feb. 15, 1979) (Implementation of Preemption Provisions of the Airline Deregulation Act of 1978) (emphasis added).[22]

As noted earlier, when the proprietor does act to regulate the use of its airport in some fashion that might affect the use of the federal airways, his conduct is subject to substantial limitations of federal law. Further, the FAA has taken the position that any proprietor action to restrict the

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[22]The California courts are not airport proprietors and thus lack the essential "status" (*Lockheed Air Terminal, Inc. v. City of Burbank, supra*, 457 F.2d at 674) necessary to regulate in this field. Although the CAB speaks here to "legislative compulsion," there is no reason to believe that it would find "judicial compulsion" more acceptable. That *Burbank* prohibits local courts from engaging in such regulation by using the "proprietor exception" to regulate proprietor conduct has already been recognized. *Village of Bensenville v. City of Chicago*, 16 Ill.App.3d 733, 735 (1973); and *Luedtke v. County of Milwaukee, supra*, 521 F.2d at 390-91.

use of its airport should be subject to the FAA's review because,

> [w]hile the airport proprietor is best situated to judge the local noise problem and to determine how to respond to it, he is not always in the best position to judge the impact of his noise reduction proposal on the national and international air transportation systems. Because of the intricacy of those systems, use restrictions at a single airport could, under certain circumstances, cause wide-spread disruption throughout those systems.

Noise Policy at 58.

Recognizing that it "has the obligation to assure that proprietor actions to meet local needs do not conflict with national and international purposes" (*Id.*), the FAA requires that a proprietor considering a "use restriction" as a tactic for noise abatement submit the proposal in advance to the FAA with: (1) a full description of alternative noise abatement techniques; and (2) a statement of the proprietor's reason for adoption of a use restriction rather than other noise abatement alternatives. The FAA requires prior submission so that it can "ensure that uncoordinated and unilateral restrictions at various individual airports do not work separately or in combination to create an undue burden on interstate or foreign commerce, unjustly discriminate or conflict with FAA's statutory regulatory authority" (*Noise Policy* at 59); and the FAA characterizes this prior review of proposed use restrictions as "vital." *Id.* Proprietor adopted use restrictions not approved in advance will not be recognized by the FAA as valid, and a proprietor adopting a use restriction without prior FAA approval may expect to be a defendant in litigation initiated by the United States. *Noise Policy* at 59-60.

While there may be some "extremely limited" role for proprietors to play in the noise abatement planning process, in cooperation with the federal authorities, and under the aegis of Congressional authority and federal law, the inquiry of the California Supreme Court in *Greater Westchester* as to whether or not this "proprietor exception" exists, misses the essential point which the court had to resolve. The question before the court in *Greater Westchester*, and the question presented to this Court, is *not* whether an airport proprietor has some residual authority to regulate the use of its airport. Rather, the question (assuming the proprietor does have some such residual authority) is whether the proprietor's conduct is subject to the supervision of federal law, or whether state courts may apply state law standards to review—and to control—the proprietor's exercise of its discretion in the otherwise preempted field. In other words, assuming that the proprietor can regulate, does that fact justify the exercise of state court jurisdiction subjecting the airport proprietor to potentially inconsistent standards of conduct? Is the regulatory scheme in this field to be uniformly subject to federal authority, or may the aviation abatement process be subject to the review and control of the states, acting through the state courts, applying state law? Those questions, which are the ones which should have been decided by the California Supreme Court in *Greater Westchester*, were answered by this Court in *Burbank*:

> We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it.

411 U.S. at 640.

Congress has not since acted to permit California, through its legislative or executive branches, or through its courts, to participate in the planning process. If the holding of this Court in *Burbank* is to have continued vitality, *Greater Westchester* must be reversed.

III

CONCLUSION.

The threat to the integrity of the national air transportation system, and to the Congressional goal of regulatory uniformity, posed by the California Supreme Court's assertion of state court jurisdiction to apply state law standards of conduct to the operation of the nation's airports is substantial. This Court should grant certiorari in order to make clear that this type of local intrusion into the preempted regulatory field is constitutionally impermissible.

Respectfully submitted,

MICHAEL SCOTT GATZKE,
LOUIS E. GOEBEL,
CHRISTOPHER J. WALT,
LUCE, FORWARD, HAMILTON & SCRIPPS,
Attorneys for Amici Curiae, the San Diego Unified Port District and the County of Orange, California.